Supreme Court, U.S.
FILED
SEP 13 1989

No. 88-2095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GORDON B. SPIVACK
DAVID H. MARKS*
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4400

Attorneys for Petitioner Axis, S.p.A.

**Counsel of Record*

TABLE OF CONTENTS

PAGE

Table of Authorities ii

TABLE OF AUTHORITIES

Cases:	PAGE
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	3, 4
Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477 (1976)	3, 4
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)	3
Conley v. Gibson, 355 U.S. 41 (1957)	2
Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)	3
Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976)	2
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	3
Scheuer v. Rhodes, 416 U.S. 232 (1973)	2
State of South Dakota v. Kansas City Southern Industries, Inc., 1989-1 Trade Cas. (CCH) 68,635 (8th Cir., June 29, 1989)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-2095

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. Antitrust injury is a requirement in every antitrust private right of action. The target of a horizontal price fixing agreement or a boycott has rarely found proof of antitrust injury difficult. The court of appeals' decision in this action, however, would create a frequently insurmountable hurdle for even such "classic" plaintiffs. Thus, as noted in the Petition, the lower court held that the reason Axis did not suffer antitrust injury was solely because it could have suffered the same injury under hypothetical facts, contrary to the facts alleged in the complaint, that did not include any antitrust violation.

Nowhere in Micafil's response to the petition does Micafil contest this description of the test of antitrust injury imposed by the court of appeals in this action. Indeed, Micafil admits as much in its description of the appellate court's holding (Br. in

Opp. at 6). While Micafil refers to a variety of factors and cases that the court of appeals itself noted, they do not limit the standard to determine antitrust injury. That standard was the only way in which the court of appeals could affirm the dismissal of Axis' action. Simply put, the complaint alleged that Axis would not have been excluded by the patents but for the illegal acquisition. That acquisition, foreclosing Axis' entry into the U.S. winder machine market, violated the Sherman Act and the Clayton Act. It was an unreasonable restraint of trade and substantially lessened competition in the U.S. market for winder machines.[1]

Certainly neither Micafil nor the lower court contends that the patent licenses which Micafil illegally acquired with the purpose and effect of foreclosing Axis' entry into the U.S. market provide any non-statutory antitrust immunity. The patents are like any other necessary asset[2] or license, acquisition of which can violate both the Sherman Act and the Clayton Act.

2. Nor can Micafil deny the applicability of this definition of antitrust injury to all Sherman Act cases, not just acquisitions. The court of appeals clearly did not so restrict the definition

---

1 Micafil's references to what "the Complaint does not allege" (Br. in Opp. at 4) imposes a standard for review of Rule 12(b)(6), Fed. R. Civ. P., dismissals that this Court rejected in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1973). The complaint clearly alleges that the acquisition foreclosed and continues to forecloses Axis' entry into the U.S. market. In addition, the allegations of the complaint that competition was substantially lessened in the U.S. market is certainly broad enough to include an allegation that competition would have been *increased* if Axis had acquired Mechaneer by substituting a fourth major innovative competitor for an underfinanced minor competitor. This Court's recognition of such a principle, as set out in cases cited at Petition at 12, is undisputed. While those cases may each have been Government actions, they clearly support the antitrust significance of Mechaneer as an entry vehicle for Axis.

2 E.g., the flour mill in *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

and one of the cases cited by Micafil is itself a Section 1 Sherman Act case involving alleged sham litigation.[3]

Micafil attempts to distinguish both *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), on the ground that those cases involved allegations of "predatory efforts" which are not alleged by Axis (Br. in Opp. at 8, 12). But, Micafil provides no reasoned basis, and cites no case, for requiring the plaintiff alleging predatory conduct under Section 2 of the Sherman Act to meet a different (and lesser) test of antitrust injury than the plaintiff alleging directly injurious foreclosure or exclusion from the market as a result of an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

3. Axis is in exactly the same position as the target of the boycott in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Each of the manufacturers could have independently decided not to sell to Klor's without raising any antitrust concern, but they could not agree to do so at the instance of Broadway-Hale Stores. While Klor's customers might well have suffered antitrust injury from the boycott, it would be irrational to conclude that Klor's, the target of the boycott, did not suffer antitrust injury and thus had no antitrust remedy. While Micafil contends that the court of appeals decision is of no general import, it provides no support for the proposition that the holding of a case applies only to its facts.

4. Similarly, Micafil turns *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), on its head. As noted in the Petition at 10, this Court specifically considered whether McCready lacked antitrust injury because, absent the illegal

---

3 The Eighth Circuit's holding in *State of South Dakota v. Kansas City Southern Industries, Inc.*, 1989-1 Trade Cas. (CCH) 68,635 (8th Cir., June 29 1989), is simply an application of long-standing antitrust standing cases. South Dakota was merely a supplier to the target of the conspiracy; South Dakota suffered indirect injury when the conspiracy allegedly succeeded. The Eighth Circuit's additional reliance on a lack of antitrust injury is, however, an example of the potential for overbroad application of the *Brunswick* dictum in Sherman Act cases.

conspiracy, McCready's employer might have chosen insurance that did not cover psychologists' charges. This Court affirmed McCready's right to sue because McCready's injury did flow from that which made the defendants' acts unlawful. Micafil ignores the holding of *McCready* solely because this Court did not reverse *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976). But it is not *Brunswick*'s holding that is the basis of the lower court's decision. It is the *Brunswick* dictum upon which Micafil and the lower court rely.[4] As in *McCready*, the lower court and Micafil "borrow selectively from *Brunswick* . . . ." 457 U.S. at 480 n. 16.

Moreover, in *McCready*, the defendants contended that only the psychologists suffered antitrust injury. In allowing McCready to sue for her damages, this Court did not hold that the psychologists' companion litigation, see 457 U.S. at 469 n. 4, should be dismissed since they did not suffer antitrust injury. McCready's right to sue did not prevent the psychologists from having a similar right. Axis is in the same functional position as the psychologists in *McCready*. The acquisition of Mechaneer had the purpose and effect of foreclosing Axis' entry to the market, just as the refusal to pay for clinical psychologists allegedly had the purpose and effect of denying them independent access to the market. Both the psychologists and Axis suffered antitrust injury.

The court of appeals held that Axis' injury did not "flow from" that which made the acquisition illegal, solely because Axis could have suffered the same injury if facts contrary to those alleged in the complaint had occurred. Micafil violated Section 1 of the Sherman Act and Section 7 of the Clayton Act because Micafil purposefully prevented the increase in competi-

---

4 Micafil's brief in opposition demeans both the Third Circuit's *Brunswick* decision and this Court's opinion in *Brunswick* reversing the Third Circuit. Micafil insists this Court's belief that "the antitrust laws do not protect a competitor from increased competition" (Br. in Opp. at 8) was so obvious that it alone would not have merited this Court's review. Yet, the "obvious" to Micafil was in fact specifically rejected by the Third Circuit in *Brunswick*. That court had allowed the plaintiff to recover treble damages based exclusively on an increase in competition.

tion that would have resulted from Axis' entry into the U.S. market by Axis' acquiring Mechaneer. The court of appeals' denial of Axis' ability to sue creates a standard which could effectively eliminate most private rights of action. Micafil simply ignores this important holding. The petition should be granted.

Respectfully submitted,

GORDON B. SPIVACK
DAVID H. MARKS*
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4400

Attorneys for Petitioner
Axis S.p.A.

* Counsel of Record